United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-5021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter

of

FLYING MAILMEN SERVICE, INC.,

Bankrupt

----------X

Docket No. 75-5021

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P/3

CHARLES GOLD,

Plaintiff-Appellant

v.

HERBERT K. LIPPMAN, Trustee in Bankruptcy of Flying Mailmen Service, Inc.,

Defendant-Appellee

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

1. Appellee's brief contains many statements not supported by the record: that the litigation brought the corporation to its knees and that the agreement was "economic blackmail" (p. 2); that the record in the proceedings revealed insolvency as of December 1970 (p. 4), and that the corporation could not then meet its obligations (p. 12). These are the issues that will have to be determined on the remand order of Judge Lasker if appellant fails in his main contention.

The statement (p. 5) that Judge Lasker directed the return of the $11,200 paid after the Chapter XI proceeding was instituted is not borne out by the record. The reference (A.4) indeed indicates the contrary since paragraph 11 of the Agreed Statement indicates only that the Trustee had the right to move for such return. And the full opinion (A.69, 70) bears this out.

2. We do not quarrel with the general statements (Points I-III, pp. 6-12) dealing with the purchase by a corporation of its own stock when insolvent. But the brief fails to come to grips with the real problem: can a federal court litigate for New York.

For to affirm the judgment appealed from would have the effect of amending New York's Uniform Commercial Code by imposing a requirement not there contained, namely, that a financing statement that involves an obligation arising out of a corporation's purchase of its own stock must say so in so many words.

We must repeat that appellant claims the status of a secured creditor given him by the statute. Insofar as appellee argues that he can challenge the validity of that part of the debt represented by the sale of the stock, he is met by the rule, which he admits to be correct (pp. 7, 8),

that knowledge bars a subsequent creditor. The constant interpretation of the statute, as pointed out in our main brief (pp. 9-12, 14),is that the statement need not disclose the transaction and that filing puts a creditor on notice.

Appellee's bare statement (p. 8) that the financing statement can be ignored because it did not specifically refer to the purchase of stock is simply not supported by any authority other than the decision below. The references (pp. 6-8) to the Bay Ridge case (98 F.2d 85) miss the point. There the mortgage falsely stated the consideration. Here there were no false statements. Inquiry with respect to the agreement which was specifically referred to in the financing statement (A. 3) would have disclosed the actual facts. Creditors must be deemed barred. We do not understand the citation (p. 7) of Engelken (104 N.Y.S.2d 970) since that case did not deal with the question of notice at all.

The discussion (p. 9) of Dawson (218 F. Supp. 411) is inaccurate. The Court did not decide that constructive notice was insufficient. Its decision rested on the fact that the filed papers gave no indication of the creation of any indebtedness (see p. 413).

3. Appellee's brief (Point IV, pp. 13-17) discusses a subject not properly before the Court at this time.

therefore, a wholly owned subsidiary of Flying Mailmen; and

Judge Lasker left the subject of the alleged unconscionableness of the December agreement for later consideration by the bankruptcy court (A. 70, 71). Judge Lasker permitted the trustee to move to amend there so as to raise this issue. The trustee did not appeal from that ruling. He cannot now argue that this Court can bypass the method provided by the District Court and accepted by him. We shall, therefore, not deal with that subject except to point out that there are statements again not supported by the record: that (p. 13) the agreement was "entirely one-sided;" that (p. 14) one party was conceding to the other's wishes "at any cost."

We shall deal with these matters when the trustee makes the motion which the District Court authorized. We submit they are not properly before this Court at this time.

4. We, of course, do not question the authority of the District Court to permit a remand if our main contention be rejected by this Court and have therefore not questioned that here.

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We also call attention to two recent cases that reaffirm the rule referred to in our main brief (p. 14) that claims which state law declares to be secured must be given

precedence in bankruptcy: In re Bain, 527 F.2d 681 (6th Cir. 1975); Matter of Browy, 527 F.2d 799 (7th Cir. 1976) - both in the Advance Sheet of March 15, 1976.

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Accordingly, the order should be reversed so far as it was appealed from.

Respectfully submitted,

HAYS, ST.JOHN, ABRAMSON & HEILBRON
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Service of three (3) copies of the within
is admitted this 9th day of April 1976

Stephen J. Nydorf

Attorney for Defendant - Appellee

by Carol Cannata